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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 817

EXPORT LIQUOR SALES, INC.
Petitioner,

vs.

AMMEX WAREHOUSE COMPANY, INC.

and

DETROIT & CANADA TUNNEL CORPORATION,
Respondents.

RESPONDENT AMMEX WAREHOUSE COMPANY, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent Ammex submits the following in opposition to the certiorari petition:

QUESTIONS PRESENTED

The questions stated by petitioner bear no resemblance to those which petitioner presented to the Court of Appeals or to the District Court. As phrased this time the

impression is left that petitioner is in some way being impeded from transacting business with Customs officers. What petitioner means is that it thinks it could transact its business more conveniently if it could occupy the location which has been leased to respondent Ammex. In true context with the facts the questions should be stated like this:

1. The Tunnel Company has leased space on its plaza to Ammex to deal in bonded liquor for export. It is not alleged that the Tunnel Company has any more space available which it could lease to petitioner. Petitioner carries on its trade in bonded liquor for export at locations off the Tunnel plaza. Are Ammex and the Tunnel Company thereby in violation of the Sherman or Clayton Acts?

2. More succinct is the statement of petitioner's counsel on the record in the court below:

> "The Court: Isn't the real basic issue here—whether or not the Tunnel Company has the right to give an exclusive franchise or whatever it may be to Ammex?
>
> Mr. Morganroth: Yes, that is the sole issue". (T 21-22).

COUNTER-STATEMENT OF THE CASE

The Detroit-Canada tunnel has its entrance on a parcel of land in downtown Detroit which is occupied by vehicle approaches and buildings containing tunnel equipment and tunnel offices, with a limited amount of space which is leased for news-stand, cigaret stand, etc., for the convenience of travelers. This includes a small area leased to Ammex, where under the observation of Customs offi-

cials Ammex delivers liquor out of bond to departing travelers. It is not claimed that there is any more space available on the tunnel property which could be leased to petitioner.

The petitioner carries on a similar business by which it sends its in-bond liquor by messenger to the tunnel entrance or inside the tunnel and there makes delivery to departing travelers under the observation of Customs officials. Petitioner's business appears to be a flourishing one. However, there has been friction between petitioner and the Tunnel Company due to petitioner's messengers interfering with traffic and slowing up the movement of cars through the entrance, and by the messengers attempting to do business inside the tunnel without paying for the privilege. The Tunnel Company began a suit in the State court to enjoin disorderly conduct.

Thereupon, Petitioner, a citizen of Michigan, brought suit in the District Court against the Tunnel Company and against Ammex, also citizens of Michigan. Jurisdiction was claimed under the Sherman and Clayton Acts (2a). The lease from the Tunnel Company to Ammex was charged to be in restraint of foreign commerce. The relief sought was to have the lease declared to be illegal, to give the petitioner unrestricted use of the tunnel property, and for treble damages (14a-16a).

On motion to dismiss it was conceded in open court that the sole question was whether the Tunnel's leasing of space to Ammex without leasing similar space to a competitor amounted to a violation of the Federal anti-trust laws (T 21-22). The court resolved this question against petitioner. The Court of Appeals affirmed (*Export Liquor Sales Inc. v. Ammex Warehouse Company, Inc.* (1970) 426 F 2d 251).

ARGUMENT

I.

In its petition to this court Export cites the Sherman Act only, seeks to distinguish *Donovan v. Pennsylvania Co.* (1905) 199 U.S. 279 on the facts, and relies on no case except *U.S. v. Yellow Cab Co.* (1946) 332 U.S. 218.

Except that there was no liquor involved, *Donovan* was exactly this case. The interstate carrier furnished space to one taxi-cab company and not to its competitor and was held not to be in violation of the Sherman Act. The Court of Appeals correctly said:

> "Despite its age, *Donovan* enjoys continued vitality. See *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority,* 362 F 2d 52, 56 (1st Cir. 1966); *Parmalee Transp. Co. v. Keeshin,* 292 F 2d 794 (7th Cir. 1961), cert. denied, 368 U.S. 944, reh. denied, 368 U.S. 972 (1962); *Friend v. Lee,* 221 F 2d 96, 100 n. 5 (D.C. Cir. 1955); cf. *Savon Gas Stations #6, Inc. v. Shell Oil Co.,* 309 F 2d 306 (4th Cir. 1962), cert. denied, 372 U.S. 911 (1963)."

So far as concerns the sole question submitted to the court below, therefore, that question has been decided exactly as this court had previously decided it.

Petitioners' *Yellow Cab* case is not in point; it dealt with an agreement between taxi-cab companies not to compete for the business of transportation between two railroad stations. This court pointed out the distinction on the facts and reiterated the *Donovan* rule, saying (332 U.S. 218 at 229):

> "It is true, of course, that exclusive contracts for the transportation service in question are not ille-

> gal (citing *Donovan*). But a conspiracy to eliminate competition in obtaining those exclusive contracts is what is alleged in this case and it is a conspiracy of that type that runs afoul of the Sherman Act."

The *Yellow Cab* case would be in point here only if it were claimed that the two competing liquor dealers (petitioner and respondent Ammex) were conspiring with each other.

II.

We now leave the case presented below and pass to the case which petitioner seeks to present here, viz. that because petitioner is obliged to transact its business outside the tunnel precincts it is less convenient for it to obtain necessary Customs supervision. We begin by observing that this court does not usually concern itself with questions which are raised here for the first time:

> *Vaughn v. Atkinson* (1962) 369 U.S. 527 at 531.
> *Helvering v. Minnesota Tea Co.* (1935) 296 U.S. 378 at 380.

However, if the supposed grievance is examined in the clothing with which petitioner would now dress it, it will be seen to be only this: A liquor merchant is annoyed because the Tunnel Company has rented to his competitor certain space which is perhaps more convenient than what he has. This is not the direct interference with commerce which the Federal statutes prohibit:

> *Terminal Warehouse Co. v. Pennsylvania Railroad* (1935) 297 U.S. 500.

The petitioner's sole problem is that he cannot remove untaxed in-bond merchandise from his bonded warehouse

except under the supervision of Customs officials. Petitioner has been able to arrange for such supervision on the street outside the tunnel and has been and now is carrying on its business. It could do so more conveniently, it evidently feels, if it could have the location which Ammex has already rented. Nobody is stopping petitioner from dealing with Customs officials and it is doing so every day.

We urge that the writ of certiorari be denied.

Respectfully submitted,

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Detroit, November 3, 1970.